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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 972 57

NORTHERN BUILDING AND LOAN ASSOCIATION,
Appellant,

vs.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH,
AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT
OF THE STATE OF WISCONSIN, ET. AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

APPELLANT'S BRIEF OPPOSING THE MOTION TO DISMISS OR AFFIRM.

EMERY J. WOODALL,
JOHN H. SCHLINTZ,
LYMAN W. SHERWOOD,
Counsel for Appellant.

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No. 972

NORTHERN BUILDING AND LOAN ASSOCIATION, A CORPORATION,

Plaintiff and Appellant,

vs.

PETER A. CLEARY, S. N. SCHAFER AND H. F. IBACH, AS THE BANKING COMMISSION OF THE BANKING DEPARTMENT OF THE STATE OF WISCONSIN, AND CLYDE P. DIGGLES, SUPERVISOR OF THE BUILDING AND LOAN ASSOCIATIONS OF THE BANKING COMMISSION OF THE STATE OF WISCONSIN,

Defendants and Appellees.

BRIEF IN REPLY TO APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Now comes the appellant and takes issue with appellees' Motion to Dismiss or Affirm and respectfully shows to this Honorable Court that appellees' statement opposing jurisdiction is without merit.

Nature of the Action and Ruling Below.

Appellant adopts as its statement of the Nature of the Case and Ruling Below the statement as set forth in Section D of its Statement of Jurisdiction heretofore filed with the Clerk of this Honorable Court, in which appellants showed that, pursuant to the authority contained in Section 5 (i) of the Home Owners' Loan Act of 1933, as amended (48 Stat. 128, 134; 646), which provides as follows:

> "(i) Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted associaton shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act."

appellant, which was a member of the Federal Home Loan Bank of Chicago, at a legal meeting as measured by the laws of Wisconsin and its charter and by-laws, obtained the requisite vote to convert itself into a Federal savings and loan association.

Appellant herein by its original action, brought in the Circuit Court of Milwaukee County, State of Wisconsin, against appellees herein, obtained a decision holding that appellant had the right and power to convert into a Federal savings and loan association, that the Acts of Congress providing for such conversion were valid and constitutional, that appellees herein had no right or authority to take possession of appellant to prevent its conversion into a Federal savings and loan association, and obtained

an injunction restraining and enjoining appellees herein from taking possession of or interfering with the proposed conversion of appellant into a Federal savings and loan association.

Appellees thereupon appealed to the Supreme Court of the State of Wisconsin. Said Supreme Court reversed the decision of said Circuit Court and granted the relief sought by appellees in their counterclaim, to-wit, a writ of injunction restraining and enjoining appellant from taking any other or further steps to convert itself into a Federal savings and loan association; and a decision that appellees had full power and authority to take possession of appellant under the laws of the State of Wisconsin.

The opinion of the Supreme Court of the State of Wisconsin, filed December 11, 1934, is found in Volume 257 of the Northwestern Reporter, at page 684.

From the final decision of the Supreme Court of the State of Wisconsin appellant herein appealed to this Honorable Court, said appeal being docketed in the October Term, 1934, as Cause No. 972.

Whereupon appellees, by Motion to Dismiss or Affirm and Statement Opposing Jurisdiction, filed May 16, 1935, attacked the jurisdiction of this Honorable Court and in reply thereto, appellant shows as follows:

Summary of Argument.

POINT 1. The Supreme Court of the State of Wisconsin erroneously construed a statute of the United States.

POINT 2. The Supreme Court of the State of Wisconsin erroneously denied certain titles, rights, privileges and immunities specially set up and claimed by appellant under a statute of the United States.

POINT 3. There was drawn in question the validity of a statute of the State of Wisconsin on the ground of its be-

ing repugnant to the Constitution and a law of the United States and the decision of the Supreme Court of the State of Wisconsin was in favor of its validity.

POINT 4. There was drawn in question the validity of a statute of the United States, and the decision of the Supreme Court of the State of Wisconsin was against its validity.

ARGUMENT.

POINT 1.

The Supreme Court of the State of Wisconsin erroneously construed a statute of the United States.

The Supreme Court of the State of Wisconsin, on page 689 of the report of the case in 257 Northwestern Reporter, made the following statement:

> "First, Has Congress by enactment of the Home Owners' Loan Act attempted to supersede the authority of the State and actually to invest the respondents with corporate power essential to a transmutation?"

The court, at the next paragraph, stated in reply to this question:

> "As to the first question, we are of the opinion that the Federal Home Owners' Loan Act does not affect the State's right to charter corporations and retain control over them under the State Constitution from the date of their beginning until in some lawfully prescribed way they pass out of existence as State corporations. Nor does that act attempt to invest the State corporations with any power not granted to them by the State which created them. The act was intended to be administered in forty-eight States, and applies to corporations operating under different degrees of State control and with different powers. It does not purport to invest the various State corpora-

> tions with any new or different corporate powers. It does no more than to afford consent applicable to corporations having the power to transmute. • • •"

It is clear, therefore, that the Home Owners' Loan Act of 1933, as amended, was before the Court and was construed by it, and further

POINT 2.

The Supreme Court of the State of Wisconsin erroneously denied certain titles, rights, privileges and immunities specially set up and claimed by appellant under a statute of the United States.

Inasmuch as appellant claimed that by Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, it had the right to convert into a Federal savings and loan association, the decision of said court holding that appellees had full power and authority to take possession of appellant necessarily denied this right, together with the titles, rights, privileges and immunities which would accrue to appellant as a Federal savings and loan association through and because of such conversion. By its injunction restraining and enjoining appellant from converting into a Federal savings and loan association, said court denied titles, rights, privileges and immunities which had been granted and provided for appellant by Section 5 (i) of the Home Owners' Loan Act of 1933, as amended; and by such holding and injunction denied a means set up and created by the Federal Congress for the conversion of State chartered members of Federal Home Loan Banks into Federal savings and loan associations. Such decision was made in spite of the fact that there was presented to said court the case of *Casey* v. *Galli*, 94 U. S. 673, wherein the Supreme

Court of the United States, by Mr. Justice Swayne, stated at page 686:

> "No authority from the State was necessary to enable the Bank so to change its organization. The option to do that was given by the 44th section of the Banking Act of Congress. 13 Stat. at L. 112. The power there conferred was ample, and its validity cannot be doubted. The Act is silent as to any assent or permission by the State. It was as competent for Congress to authorize the transmutation as to create such institutions originally."

This decision was reached in passing upon a statute containing (Section 44 of the National Bank Act, 13 Stat. 44, 112), a grant of the power of conversion into national banks which was in language so similar to the conversion language of Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, that for the purpose of consideration of the legal result intended, no different conclusion could be reasonably reached. We therefore contend that by this decision of said highest court Federal titles, rights, privileges and immunities were denied appellant and an important Federal question decided in a manner entirely adverse to the obvious intent of the Congress in enacting such statute and further, in direct opposition to the customary, distinct and reasonable meaning of the words of the statute itself. We further show this Honorable Court that, as of May 21, 1935, there was invested in the shares of Federal savings and loan associations by the United States Treasury, as is shown by the records of the Federal Home Loan Bank Board, the total sum of $25,034,300.00, of which amount a total sum of $11,209,300.00 was invested in 254 associations which had converted into Federal savings and loan associations under authority of Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, the status of which sum is greatly endangered by the decision of the Supreme Court of the State of Wisconsin.

POINT 3.

There was drawn in question the validity of a statute of the State of Wisconsin on the ground of its being repugnant to the Constitution and a law of the United States and the decision of the Supreme Court of the State of Wisconsin was in favor of its validity.

The court stated, on page 686, that: "The cause was first submitted upon arguments and briefs * * * as to the power of Congress to supersede the authority of the State over building and loan associations created by the State and to invest such corporations with corporate power to transmute * * *".

It then went on to say: "We have since been favored by the contending parties with supplemental briefs in which are able discussions of the reservation by the State of power over corporate charters * * *. We are convinced that the precise question before us relates to the power of a building and loan association, organized under and subject to the laws of the State of Wisconsin, to convert itself into a Federal savings and loan association under the Federal Act."

After some further discussion the court, at the top of page 687, held as follows:

> "Under the declared law of the State, we are bound to hold that a corporation organized under our general incorporation laws has not the power to divest itself of the corporate character derived from this sovereign State by accepting a charter from any other sovereign government. Our Constitution, section 1, Art. 11, provides: 'All general laws or special acts enacted under the provisions of this section (section authorizing the creation of corporations) may be altered or repealed by the legislature at any time after their passage.'"

We contend that this definite holding by the Supreme Court of the State of Wisconsin sustained the validity of a State law which was drawn in question on the grounds of its repugnancy to the Constitution and a law of the United States, to-wit, Article VI of the United States Constitution, providing that: "This Constitution and the laws of the United States which shall be made in pursuance thereof • • • shall be the supreme law of the land", and Section 5 (i) of the Home Owners' Loan Act of 1933, as amended. As will be noted from the court's statement, the "power of Congress to supersede the authority of the State" was squarely before the court and considered in connection with a State law and the State constitution. The court determined that the State law did not allow State building and loan associations to transmute; although appellant did claim that such right was granted by Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, the court flatly ruled that the State law denied to appellant the right so set up and claimed, i. e., to convert. The following statements made by appellees in Subdivisions II and III of their Statement Opposing Jurisdiction and Motion to Dismiss or Affirm are without foundation and based on a mistaken concept of the case:

> II. "There was not drawn in question the validity of any statute of the State of Wisconsin on the ground of its being repugnant to the Constitution, treaties, or laws of the United States."
>
> III. "The appellant at no time challenged the validity of any section of the Wisconsin Constitution, or any of the statutes of the State of Wisconsin."

Point 4.

There was drawn in question the validity of a statute of the United States and the decision of the Supreme Court of the State of Wisconsin was against its validity.

Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, provides:

> "Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 percentum or more of the votes cast at a legal meeting called to consider such action; * * *"

Appellant was such a member, it held a legal meeting as measured by the laws of Wisconsin and its charter and by-laws, and at such meeting the required vote was cast. We contend that appellant "under this Act" was entitled to convert into a Federal savings and loan association and that the injunction issued by the Supreme Court of the State of Wisconsin necessarily draws in question the validity of said statute of the United States and is against its validity because, by authority of said court, appellant is restrained from converting into a Federal savings and loan association. The effect of the injunction necessarily destroys the effectiveness and validity of said Federal statute. Whatever words said court may have used in explaining its action, the effect of its action destroyed the conversion of appellant, and thus destroyed the statute. If Congress had power to enact such law, said court has no power to destroy such law.

Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, provided a method whereby appellant could become a Federal savings and loan association and under said Act appellant fulfilled all requirements and conditions of said Section 5 (i) and all rules and regulations of

the Federal Home Loan Bank Board promulgated thereunder prerequisite to conversion and but for said injunction and decision, would be a Federal savings and loan association. The injunction of said court destroyed the legal means created by the Federal Congress. In law, as in life, actions speak louder than words; the action of said highest court was against the validity of the means and prevented the legal result created by the Federal Congress and by such action, in fact, denied the validity of such Federal Act.

Section 5 (i) of said Federal Act provides that *any* member of a Federal Home Loan Bank may convert itself. It does not contain any words of limitation. It clearly provides that all members of Federal Home Loan Banks may convert. The Supreme Court of the State of Wisconsin stated, at page 689:

> "The act was intended to be administered in forty-eight States and applies to corporations operating under different degrees of State control and with different powers."

Such language should have suggested to the court the plain meaning of the statute. The following statement of said court that:

> "It does no more than to afford consent applicable to corporations having power to transmute."

is, therefore, a clear mistake. The Federal Congress said *any* member of a Home Loan Bank may convert. Said court held that only such members of Federal Home Loan Banks are permitted to convert as have been given power to convert by their respective State legislatures. Such holding is not interpretation, it is not construction, it is nullification of a Federal statute. The Federal statute does not speak in terms of "power" or "permission"; it

created legal means and legal effect, to-wit, conversion of *any* member of a Federal Home Loan Bank into a Federal savings and loan association. The injunction which denies and destroys such legal effect speaks louder than the opinion which spoke in terms of interpretation and construction. The Federal statute expressly provides the sole means by which *any* member may convert, to-wit, "51 per centum or more of the votes cast at a legal meeting called to consider such action." The Supreme Court of the State of Wisconsin added to such statute, by its injunction and its decision, a new and unwarranted condition, i. e., that a member of a Federal Home Loan Bank, to-wit, appellant, must obtain the enactment of a statute in Wisconsin authorizing appellant to take advantage of the Federal grant of "power" and "permission" in order to use the means and obtain the legal effect created by Congress, i. e., conversion. The imposition of such burdensome condition which Congress had not required is an attempt by said Court to exercise legislative power which resides in the Federal Congress. It is the repeal of the statute enacted by Congress and the attempt to enact a new and different statute. The prevention by said court of the legal result created by the Federal Congress, because of failure by appellant to fulfill such new and unreasonable condition, cannot be termed mere construction or interpretation of a Federal statute, but must be viewed as a destruction of its validity. Although in form the court has interpreted the Federal statute, the result and force of its decision and injunction denied the validity of such statute.

Said court in the following language clearly indicates that it has adopted a strained and mistaken interpretation of Section 5 (i) of Home Owners' Loan Act of 1933, as amended:

> "If our conclusion that the Home Owners' Loan Act operates merely as an authority or consent, or defini-

tion of the conditions under which transmutation will be permitted, so far as the Federal government is concerned, without purporting to increase corporate powers of State corporations, is not clearly sustained by the act, it must at least be said to be ambiguous and to be open to this construction. We think it should be so construed in order to avoid a number of serious constitutional objections which may here be recited without determining their validity, but merely as an aid to construction. The first is the objection that since Wisconsin by power reserved in its constitution, has retained control over corporations under its laws, and since the State undoubtedly had plenary powers, both of organization and control, prior to this act, *it cannot be ousted by any act of Congress from these powers* (italics ours); that since a building and loan association is not a banking institution, the case of Casey v. Galli, supra, has no application; that the change in the corporate charter permitting conversion upon a vote of 51 per centum of the stockholders *would be an impairment of the contract rights of stockholders in a Wisconsin corporation* (italics ours). That there are serious constitutional objections must be conceded, whatever their proper solution may be. Further than this, an attempt on the part of Congress to interfere with the control of corporations organized under State laws, and to invest them with new powers, must certainly be regarded as a very sweeping and fundamental innovation. In view of these considerations, the act itself should contain the clearest sort of language to warrant the contention asserted by respondents. This we do not find."

Such language of said highest court, taken in connection with the injunction issued by it, demonstrates clearly the following bases for this appeal:

1. Said highest court held Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, invalid.

2. It adopted the form of construing the Act in order to avoid expressly holding the statute invalid.

The Supreme Court of the State of Wisconsin attempts to avoid passing upon the serious constitutional objections which it states would be raised by refusing to hold that Congress intended what its statute provided to-wit, that *any* member of a Federal Home Loan Bank may convert itself into a Federal savings and loan association, and what the Supreme Court of the United States (in *Casey* v. *Galli, supra*) said practically the same words (in the National Banking Act, 13 Stat. 112) meant, to-wit, the act is silent as to any assent or permission by the State. No authority from the State is necessary to enable any member of a Federal Home Loan Bank so to change its organization. The option to do that was given by Section 5 (i) of Home Owners' Loan Act of 1933, as amended. The power there conferred was ample. It endeavored to avoid the solution of these objections by stating that Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, should "contain the clearest sort of language to warrant the contention asserted by" appellant association (257 N. W. 690). We contend that Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, does now contain the clearest sort of language to warrant validity of conversion, to-wit, "any member of a Federal Home Loan Bank may convert itself into Federal Savings and Loan Association *under this Act.*" (Italics ours.)

Said highest court wholly ignored that such conversion by the express provisions of Section 5 (i) was to take place "under this Act."

As aforesaid, the Supreme Court of the State of Wisconsin had before it the decision in the case of *Casey* v. *Galli, supra,* in which the Supreme Court of the United States held.

(1) That no authority from a State was necessary to enable the State bank to convert itself into a national bank;

(2) That the Federal statute (Sec. 44 of the National Banking Act, 13 Stat. 112), conferred ample power;

(3) That the validity of such act could not be doubted;

(4) That the act was silent with respect to consent or permission on the part of the State. In that regard the court said:

> "It was as competent for Congress to authorize the transmutation as to create such institutions originally."

Such decision interpreting the National Banking Act, 13 Stat. 112, compelled the Supreme Court of the State of Wisconsin to recognize that the words "any bank • • • may • • • become a national association" had been interpreted by the Supreme Court of the United States as meaning a grant of right, power, privilege and immunity to convert without regard to State laws. In *Casey* v. *Galli, supra,* the Supreme Court of the United States had not required the additional condition that the law of the State of Louisiana be amended so as to authorize the bank to convert; it had not held that the Federal statute did no more than to afford consent applicable to corporations which had obtained power from State law to transmute.

In *Fox River Paper Co.* v. *Railroad Commission of Wisconsin* (274 U. S. 651), it was held that whether a State court, in basing its decision on non-Federal grounds, has thereby sought to evade a constitutional issue, is a question on which the litigant is entitled to invoke the judgment of the Supreme Court of the United States.

In *Leathe* v. *Thomas* (207 U. S. 93, 99), the Court stated:

> "Of course, there might be cases where, although the decision put forward other reasons, it would be appar-

> ent that a Federal question was involved, whether mentioned or not. It may be imagined, for the sake of argument, that it might appear that a State court, even if ostensibly deciding the Federal question in favor of the plaintiff in error, really must have been against him upon it, and was seeking to evade the jurisdiction of this court. If the ground of decision did not appear and that which did not involve a Federal question was so palpably unfounded that it could not be presumed to have been entertained, it may be that this court would take jurisdiction."

Indeed, as was held in the cases of *Neilson* v. *Lagow* (53 U. S. (12 How.) 98); *Klinjer* v. *Missouri* (80 U. S. (13 Wall.) 257) and *Ward* v. *Love County* (253 U. S. 17), non-Federal grounds put forward by a highest State court, which are plainly untenable, will not preclude the Supreme Court of the United States from taking jurisdiction; it will be presumed that the State court based its judgment on the Federal grounds in question.

The Supreme Court of the State of Wisconsin attempted to avoid the force of the interpretation of language in the National Banking Act which is almost identical to the language under consideration in Section 5 (i) of the Home Owners' Loan Act by establishing a false distinction between banks on the one hand and building and loan associations on the other. It stated in its opinion, page 690:

> "Whatever power Congress may have over transmutation of banking corporations, it may at least be reasonably questioned whether it has such power with respect to domestic corporations organized under State law * * *. This act constituted an unmistakable investiture of corporate power upon State banks."

It refused to recognize the power of Congress to invest State building and loan associations with such power on the grounds that:

> "They are not banks; they have not banking powers or privileges under our State law." (Page 686.)

It is apparent that the reason for the distinction made by the Supreme Court of the State of Wisconsin between banks and building and loan associations was that said court did not believe that Congress had power to invest State building and loan associations with corporate power to convert without regard to State laws as Congress had invested State banks with such power. It is therefore perfectly apparent that the effect of the decision and injunction of the Supreme Court of the State of Wisconsin is the invalidation of Section 5 (i) of the Home Owners' Loan Act of 1933, as amended. The Supreme Court of the State of Wisconsin has made it plain, therefore, on the face of its decision, that the reason for its decision and for its injunction is that said court does not believe that Congress had constitutional power to enact said Section 5 (i).

Although the court stated, at page 689:

> "Second, if it be found that it was the purpose of Congress by that act thus to increase respondent's corporate powers, then, has Congress the power to accomplish his result?
>
> "We are not treating specifically the second question for reasons pointedly set forth, * * *."

said court did not refrain from answering said second question but, in fact, based its decision and its injunction upon a negative answer to such question.

It therefore seems plain that the Supreme Court of the State of Wisconsin erred:

(1) In refusing the authority of *Casey* v. *Galli, supra,* as to the validity of the Federal statute providing for conversion;

(2) As to the clear and unmistakable meaning of almost identical statutory language authoritatively construed by

this Honorable Court as was clearly pointed out to it by appellant, and

(3) By its injunction, which, in fact, destroyed the legal result and the validity of a Federal statute.

WHEREFORE, appellant respectfully submits that appellees' Motion to Dismiss or Affirm the decision of the Supreme Court of the State of Wisconsin should be denied; that appellees' Statement in Opposition to Jurisdiction is without merit and should be disregarded; that this Honorable Court has jurisdiction to hear this appeal under Section 237 (a) of the Judicial Code (28 U. S. C. 344 (a)); and that this Honorable Court should hear appellant's appeal upon its merits. In any event, appellant submits that a substantial and important Federal question is presented that certain titles, rights, privileges and immunities specially set up and claimed by appellant under a statute of the United States, to-wit, Section 5 (i) of the Home Owners' Loan Act of 1933, as amended, were denied, and further submit that this Honorable Court has jurisdiction to review such decision of the Supreme Court of the State of Wisconsin under the provisions of Section 237 (b) and (c) of the Judicial Code (28 U. S. C. 344 (b), (c)).

Respectfully submitted,

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